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The Voting Rights Act Does Not Prevent Preclearance When the Retrogressive Impact of a Redistricting Plan Does Not Impair the Ability of Minority Voters to Elect Candidates of Their Choosing in Their District: *Georgia v. Ashcroft*

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The Voting Rights Act Does Not Prevent Preclearance When the Retrogressive Impact of a Redistricting Plan Does Not Impair the Ability of Minority Voters to Elect Candidates of Their Choosing in Their District: *Georgia v. Ashcroft*

FEDERAL STATUTES – VOTING RIGHTS ACT – VOTER REDISTRICTING PLANS – SECTION 5 PRECLEARANCE – The United States Supreme Court ruled that a vote dilution violation under Section 2 of the Voting Rights Act is not an independent reason to deny Section 5 preclearance when redrawing voting districts based on changes stemming from the United States Census.

Georgia v. Ashcroft, 123 S. Ct. 2498 (2003).

In response to the 2000 national census, the Georgia General Assembly set about the task of redrawing the borders of its voting districts for the Georgia State Senate (hereinafter "State Senate" or "Senate") to reflect changes in its population.[1] Since 1990, this process in Georgia has been the subject of frequent litigation to ensure the state's compliance with Section 5 of the Voting Rights Act (hereinafter "VRA").[2] Prior lawsuits had forced the presentation of multiple redistricting plans before an agreement could be reached with the Department of Justice, which was subsequently held unconstitutional by the Supreme Court.[3] The 2000 plan

1. Georgia v. Ashcroft, 123 S. Ct. 2498, 2505 (2003). The Georgia Constitution specifies that "apportionment of the Senate and House of Representatitves shall be changed by the General Assembly as necessary after each United States decennial census." GA. CONST. art. 3, § 2, ¶ II.

2. 42 U.S.C. § 1973c (2003). § 5 requires that before a covered jurisdiction's new voting standard, practice or procedure goes into effect, it must be precleared by either the Attorney General of the United States or a federal court to ensure that the change "does not have the purpose, and will not have the effect, of denying or abridging the right to vote on account of race or color." *Id.* The purpose of this section is to forbid the modification of voting procedures that would have a retrogressive effect on the abilities of minority voters to elect candidates of their choosing. Beer v. United States, 425 U.S. 130, 141 (1976). These obligations are applied to jurisdictions with a history of racial discrimination in their electoral procedures. Georgia v. Ashcroft, 195 F. Supp. 2d 25, 29 (D.D.C. 2002). Georgia was designated a covered jurisdiction by the Attorney General in 1965. Miller v. Johnson, 515 U.S. 900, 905 (1995).

3. *Ashcroft,* 123 S. Ct. at 2504-05. The 1990 redistricting plan increased the number of majority-minority districts, but the Department of Justice refused preclearance because

(hereinafter "plan") was an effort by the Democratic leadership of the General Assembly to maintain the number of majority-minority districts, while at the same time increasing the overall number of Democratic Senate seats.[4] The Senate adopted the plan in August of 2001, with ten of the eleven black Senators, and thirty-three of the thirty-four black Representatives voting in its favor.[5] The Governor signed the Senate plan into law, and the state sought preclearance of the plan.[6]

Georgia filed suit in the United States District Court for the District of Columbia, requesting a declaratory judgment that the redistricting plan was in accord with Section 5 of the Voting Rights Act.[7] It attempted to prove that its Senate plan was not retrogressive in either its intent or effect.[8] The United States argued that the 2001 Senate plan's changes to the boundaries of Districts 2, 12, and 26 unlawfully reduced the ability of black voters

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the plan did not contain a sufficient number of those districts. *Id.* at 2504. In 1992, the Department of Justice granted preclearance to the State Senate's third redistricting plan, only to have its congressional districting plan declared unconstitutional as racial gerrymandering in 1995 by the holding of *Miller*. *Id.* Another State Senate plan was passed in 1995, but this was found to artificially push the percentage of black voters within some majority black districts as high as possible. Johnson v. Miller, 929 F. Supp. 1529, 1543 (S.D. Ga. 1996). After the *Miller* decision, Georgia passed a new plan in 1997 that reflected changes to accommodate the Court's ruling in *Miller*, and that of the district court in *Johnson*. *Ashcroft,* 123 S. Ct. at 2505. This 1997 plan set the stage for the litigation in this case because it was in effect at the time of the 2001 redistricting. *Id.*

4. *Ashcroft,* 123 S. Ct. at 2505. The Director of Georgia's Legislative Redistricting Office testified that the Senate Black Caucus wanted to maintain the existing majority-minority districts while at the same time not wasting black votes in landslide victories. *Id.* at 2505-06. The intention of the plan was to create "influence districts" where black voters would be able to exert a significant impact on the election process, rather than packing them into minority-dominated districts. *Id.* at 2506. This plan established 13 additional districts with a black voting age population between 30% and 50%, and four other districts with a black voting age population between 25% and 30%. *Id.* This was an increase from the 1997 plan, which featured ten Senate districts with a majority-black voting age population, and eight Senate districts with a black voting age population between 30% and 50%. *Id.*

5. *Id.* at 2506.

6. *Id.* at 2506-07.

7. Georgia v. Ashcroft, 195 F. Supp. 2d 25, 29 (D.D.C. 2002). Under § 5 of the Voting Rights Act the state has the option of applying for administrative preclearance through the Attorney General of the United States, or by instituting an action in district court. *Ashcroft,* 123 S. Ct. at 2507.

8. *Ashcroft,* 123 S. Ct. at 2507. The state submitted evidence of the total population, total black population, the black voting age population, percentage of black registered voters, and the overall percentage of Democratic voters residing in each district. *Id.* It also submitted testimony from people involved in enacting the Senate plan, and United States Congressman John Lewis of Atlanta, showing the plan's purpose was to ensure a Democratic majority in the Senate. *Id.* Evidence was also presented with respect to three proposed Senate districts objected to by the United States, and two districts challenged by intervenors. *Id.*

to elect candidates of their choosing.[9] It recognized that a limited percentage of whites would vote for a black candidate, but maintained that percentage was not high enough for black voters to elect a candidate of their choosing.[10] The district court stated that the evidence presented by the United States focused on only three contested districts in the State Senate plan, and was not designed to assess its overall impact.[11] Four African-American citizens of Georgia were permitted to intervene, pursuant to Federal Rule of Civil Procedure 24,[12] identifying two other districts where retrogression was alleged to occur.[13] A three-judge panel of the district court refused to grant preclearance to Georgia's State Senate redistricting plan, holding that it violated Section 5.[14] The dissenting opinion of Judge Oberdorfer would have given more weight to the evidence presented by the proponents of the State Senate

9. *Id.* The United States noted that the black voting age population in District 2 dropped from 60.58% to 50.31%, in District 12 from 55.43% to 50.66%, and in District 26 from 62.45% to 50.80%. *Id.* The percentage of black registered voters dropped to just under 50% in all three of these districts, and the government provided evidence that voting is racially polarized in all of them. *Id.* at 2508.

10. *Id.* at 2508. The United States offered testimony from witnesses residing in Districts 2, 12, and 26 who claimed that the new boundaries of these districts would reduce the ability of blacks to elect their candidate of choice. *Id.* Testimony was also offered from the only black Senator who voted against the plan, Senator Regina Thompson, the Republican leader of the Senate, Senator Eric Johnson, and black legislators who voted for the plan but were concerned as to how the plan would impact black voters. *Id.*

11. *Georgia,* 195 F. Supp. 2d at 37.

12. FED. R. CIV. P. 24(a). This rule provides that a party may be permitted to intervene in an action when a statute of the United States confers an unconditional right to intervene, or when the applicant claims an interest relating to the property or transaction which is the subject of the action and the disposition of the action affects the applicant's interest. *Id.*

13. *Ashcroft,* 123 S. Ct. at 2508. The intervenors challenged all three plans proposed by the state, but provided little evidence beyond proposals for alternate plans and an expert report criticizing the state's expert in support of their position. *Georgia,* 195 F. Supp. 2d at 37.

14. *Georgia,* 195 F. Supp. 2d at 97. Judge Sullivan authored the majority opinion, joined by Judge Edwards, stating that Georgia had "not demonstrated by a preponderance of the evidence that the State Senate redistricting plan would not have a retrogressive effect on African American voters" effective exercise of the electoral franchise. *Id.* The court found that Districts 2, 12, and 26 were retrogressive because there was a lesser chance than under the previous plan for the black candidate of choice to win election due to the reduction in black voter age population in those districts. *Georgia,* 195 F. Supp. 2d at 93-94. The Court also held that Georgia failed to present any evidence that this retrogression would be offset by gains in other districts. *Id.* at 88. Judge Edwards, joined by Judge Sullivan, concurred in an opinion stressing that § 5 and § 2 of the Voting Rights Act are procedurally and substantively distinct provisions, thus rejecting Georgia's contention "that a plan preserving an equal opportunity for minorities to elect candidates of their choice satisfies § 5." *Id.* at 97, 101-02. He also rejected the testimony of the black Georgia politicians who supported the plan, thinking that it did not address whether racial polarization was present in the contested districts. *Id.* at 101-02.

plan.[15] After preclearance was denied, the Georgia General Assembly received preclearance for another redistricting plan similar to the one in this litigation, except it added black voters to the disputed districts.[16]

Because a three-judge district court panel handed down this ruling, the appeal went directly to the Supreme Court, which vacated the judgment below and remanded for further proceedings consistent with its opinion.[17] In deciding this appeal, the Supreme Court first addressed whether the district court erred by allowing the intervention of private litigants in this lawsuit.[18] The Court determined that the district court properly found that intervention was allowed under Federal Rule of Civil Procedure 24, and that the intervenors would be impacted by the redistricting plan.[19] Moving to the merits of the case, the Court stated that the district court failed to consider all of the relevant factors related to the retrogression of black voters' ability to effectively elect members to the Georgia Senate.[20] In making this determination, the Court analyzed the issue of whether a plan that would satisfy Section 2 of the Voting Rights Act should be precleared under Section 5.[21] Writing for the majority, Justice O'Connor stated that the Court has "consistently understood" Section 2 to "combat different evils and, accordingly, to impose very different duties upon the

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15. *Georgia*, 195 F. Supp. 2d at 102 (Oberdorfer, J., dissenting). Judge Oberdorfer's reason for supporting the Senate plan was as follows:

> However, with respect to the state Senate redistricting plan, I give greater credence to the political expertise and motivation of Georgia's African-American political leaders and reasonable inferences drawn from their testimony and the voting data and statistics than to what I find to be flawed opinions of experts and conflicting lay witness testimony presented by the Department of Justice and intervenors.

Id. He noted that the Supreme Court had not yet determined whether preclearance should be granted for a redistricting plan preserving or increasing the number of districts statewide where minorities have a fair or reasonable chance to elect candidates of their choosing, or whether every district must remain at or improve on their benchmark probability of victory, even if the result is minority super-majorities exceeding the level required to ensure victory. *Id.* at 117.

16. Georgia v. Ashcroft, 204 F. Supp. 2d 4 (D.D.C. 2002). The holding of that case is not in dispute in this appeal. *Ashcroft*, 123 S. Ct. at 2509.

17. *Ashcroft*, 123 S. Ct. at 2517. Any party may appeal to the Supreme Court from an order in an action required by any Act of Congress to be heard and determined by a district court of three judges. 28 U.S.C. § 1253 (2003).

18. *Ashcroft*, 123 S. Ct. at 2509. Georgia maintained that private parties should not be allowed to intervene in § 5 actions due to their political motives. *Id.* § 5 does not limit the application of the Federal Rules of Civil Procedure in a preclearance case, allowing private parties to intervene. *Id.*

19. *Id.* at 2509-10.

20. *Id.* at 2514.

21. *Id.* at 2510.

States."[22] She declared that Section 2 applies to all states, while Section 5 is limited to particular covered jurisdictions, resulting in a different method of inquiry between the two sections.[23] In a previous holding, the Court determined that a violation of Section 2 is not an independent reason to deny preclearance under Section 5.[24]

One of Georgia's arguments in support of its redistricting plan was that compliance with Section 2 suffices for preclearance under Section 5.[25] Instead, the Court stated that Georgia must prove that its plan is nonretrogressive under Section 5.[26] The state further argued that even if compliance with Section 2 does not qualify under Section 5, its State Senate plan should be precleared because it would not diminish a minority voter's exercise of the electoral franchise.[27] The Court then examined the meaning of what constitutes the effective exercise of the electoral franchise, determining that the inquiry must evaluate the entire statewide plan as a whole.[28] A second phase of the analysis employed by the Court required an examination of all the relevant circumstances that factor into an assessment of a retrogressive effect.[29] When

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22. *Id.* (quoting Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 477 (1997) (*Bossier Parish I*)).

23. *Ashcroft*, 123 S. Ct. at 2510. The essence of a § 2 vote dilution claim is that a certain electoral law, practice or structure causes an inequality in the opportunities enjoyed by black and white voters to elect the candidates of their choice. *Ashcroft*, 123 S. Ct. at 2510 (quoting Thornburg v. Gingles, 478 U.S. 30, 47 (1986)). By contrast, a retrogression inquiry under § 5 requires a comparison of a jurisdiction's new voting plan with its existing plan. *Id.* (quoting *Bossier Parish I*, 520 U.S. at 478).

24. *Bossier Parish I*, 520 U.S. at 477. In *Bossier Parish I*, the Court stated that "recognizing § 2 violations as a basis for denying § 5 preclearance would inevitably make compliance with § 5 contingent upon compliance with § 2." *Id.* This would result in § 5 standards being replaced with § 2 standards, contradicting the Court's longstanding interpretation of these sections. *Id.*

25. *Ashcroft*, 123 S. Ct. at 2510. This was the other side of the argument made in the *Bossier Parish I* case, and the Court rejected it here because they refused to equate a § 2 vote dilution inquiry with the § 5 retrogression standard. *Id.* The Court said that this analysis would "shift the focus of § 5 from nonretrogression to vote dilution, and [would] change the § 5 benchmark from a jurisdiction's existing plan to a hypothetical, undiluted plan." *Id.* at 2510-11 (quoting *Bossier Parish I*, 520 U.S. at 480).

26. *Ashcroft*, 123 S. Ct. at 2511.

27. *Id.*

28. *Id.* Justice O'Connor stated:

> Thus, while the diminution of a minority group's effective exercise of the electoral franchise in one or two districts may be sufficient to show a violation of § 5, it is only sufficient if the covered jurisdiction cannot show that the gains in the plan as a whole offset the loss in a particular district.

Id.

29. *Id.* Some factors to be considered include "the ability of the minority to elect their candidate of choice, the extent of the minority's opportunity to participate in the political process, and the feasibility of creating a nonretrogressive plan." *Id.*

reviewing these circumstances, the majority stated that the comparative ability of a minority group to elect a candidate of its choice should not be the sole focus.[30]

Justice O'Connor went on to discuss the method of determining the ability of minority voters to elect their candidate of choice.[31] She stated that this might be done by a state creating a certain number of "safe districts," where it is highly likely that minority voters will be able to elect their favored candidate.[32] The majority also said the state may choose to create a larger number of districts where it is likely that minority voters will be able to elect candidates of their choosing, although the likelihood of election of a minority candidate may not be as great as it was under the benchmark plan.[33] However, the Court explained that Section 5 does not dictate that a state must choose one of these redistricting methods over another.[34] After analyzing all of the factors to be considered, Justice O'Connor determined that Section 5 gives the states the flexibility to choose one theory over the other.[35]

In the Court's view, another highly relevant factor in a retrogression inquiry is the extent that a new plan might change the minority group's opportunity to participate in the political process.[36] Employing such an analysis, Justice O'Connor explained that this requires the Court to examine whether a new plan adds or subtracts "influence districts" where minorities can play a sub-

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30. *Id.* "While this factor is an important one in the § 5 retrogression inquiry, it cannot be dispositive or exclusive." *Id.* The standard to be employed in § 5 is whether the new plan "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Id.* (quoting *Beer*, 425 U.S. at 141).

31. *Ashcroft*, 123 S. Ct. at 2511.

32. *Id.*

33. *Id.*

34. *Id.* The Court cited its opinion in Thornburg v. Gingles, 478 U.S. 30 (1986), stating either option "will present the minority group its own array of electoral risks and benefits," and presents "hard choices about what would truly 'maximize' minority electoral success." *Id.* at 2511-12 (quoting *Thornburg*, 478 U.S. at 89 (O'Connor, J., concurring in judgment)). While the creation of a small number of safe majority-minority districts may virtually guarantee the election of their chosen candidate in those districts, such a plan runs the risk of isolating minority voters from the rest of the state and narrowing their political influence. *Id.* at 2512. This may result in the representative of a particular district mirroring the race of the voters who live there, however, the number of such representatives across the state may be limited to fewer districts. *Id.* The Court further stated that spreading minority votes across a greater number of districts might increase the number of districts where minority voters could elect a candidate of their choice, and create coalitions of voters who will help to achieve the electoral aspirations of the minority group. *Id.*

35. *Id.* at 2512.

36. *Ashcroft*, 123 S. Ct. at 2512.

stantial role in the election of candidates.[37] She further stated that an important factor considered in evaluating the weight of these districts is the willingness of candidates to take the minority's interests into account if elected without decisive minority support.[38] Justice O'Connor declared that Section 5 gives states the discretion to choose to use "influence" and "coalitional" districts, with the idea that it is better to risk having fewer minority representatives in the hope of increasing the number sympathetic to the interests of minority voters.[39] In addition to these influence districts, the Court explained that another means for assessing retrogressive effect is "to examine the comparative position of legislative leadership, influence, and power for representatives of the benchmark majority-minority districts."[40] A further consideration suggested by Justice O'Connor goes to whether the representatives elected from the districts protected by the Voting Rights Act support the redistricting plan.[41] The majority disagreed with the district court, stating that this evidence is relevant to determining retrogressive effect.[42]

Addressing the concerns of the dissent, the majority stated that the ability of a minority group to elect a candidate of their choosing remains an integral feature in any Section 5 analysis.[43] While the dissent asserted that a Section 5 inquiry cannot go beyond assessing whether a minority group can elect a candidate of its choice, Justice O'Connor cited the words of Justice Souter from the

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37. *Id.* Justice O'Connor cites various studies that suggest the creation of more influence or coalitional districts might be the most effective way to maximize minority voting strength. *Id.* at 2513.

38. *Id.* (quoting *Thornburg,* 478 U.S. at 100 (O'Connor, J., concurring in judgment)).

39. *Id.* at 2513.

40. *Id.* The Court states that the maintaining or increasing of legislative positions of power for minority voters' chosen representatives can be used as evidence of a lack of retrogressive effect. *Id.*

41. *Ashcroft,* 123 S. Ct. at 2513. The district court stated that support of legislators from benchmark majority-minority districts may show a lack of retrogressive purpose, but it is not relevant in assessing retrogressive effect. *Georgia,* 195 F. Supp. 2d at 89.

42. *Ashcroft,* 123 S. Ct. at 2513. The Court recognized that representatives of districts created to protect minority interests possess knowledge of how their voters will probably act, and whether or not the changes will decrease their ability to exercise their electoral franchise. *Id.*

43. *Id.* at 2513-14. Assessing a plan with coalitional districts is subject to the same retrogression analysis as one with influence and coalitional districts. *Id.* Evidence of racial polarization is a relevant factor considered in assessing whether a minority group is able to elect its chosen candidate or exert significant influence in the voting process. *Id.* at 2514.

majority opinion in *Johnson v. DeGrandy*,[44] recognizing the importance of considering this factor in assessing a Section 2 vote-dilution inquiry.[45] The Court decided that in evaluating the differences between a new districting plan and the benchmark, the same standard should apply to Section 5 situations.[46]

In making its ruling, Justice O'Connor declared that the district court failed to consider all of the relevant factors in examining whether retrogression occurred under Georgia's Senate plan.[47] The majority held that the district court focused too heavily on the proposed Senate Districts 2, 12, and 26, failing to examine the increases in black voting age population that occurred in the other districts.[48] According to Justice O'Connor, the district court also failed to explore in depth any other factor beyond the comparative ability of black voters to elect the candidate of their choice in the majority-minority districts, ignoring the support of legislators from those districts.[49] While the changes made in the disputed districts made the likelihood of electing a minority supported candidate marginally less possible, the majority ruled that the district court's inquiry was too narrow in the face of the evidence presented, and the Senate plan as a whole was not retrogressive.[50] Using figures generated by the 2000 census, Justice O'Connor determined that Georgia had sufficiently offset the losses in the disputed districts by overall gains statewide, satisfying the requirements of Section 5.[51] The Court analyzed further data that demonstrated the ability of minority voters to exert influence in the districts where they do not have a majority.[52] As a result, the Court determined that the district court did not engage in the correct retrogression analysis, focusing too heavily on the ability of

44. 512 U.S. 997 (1994). "[T]he 'extent of the opportunities minority voters enjoy to participate in the political process' is an important factor to consider in assessing a § 2 vote-dilution inquiry." *Id.* at 1011-12.

45. *Ashcroft*, 123 S. Ct. at 2514.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Ashcroft*, 123 S. Ct. at 2515.

51. *Id.* at 2515-16. Under those figures, the number of districts with a majority-minority voting age population increases from ten to thirteen, and the number of districts with a black voting age population between 30% and 50% increases from eight to thirteen. *Id.* This confirmed the state's goal of unpacking minority voters from heavily dominated districts to increase their influence across the state. *Id.*

52. *Id.* Almost all of the thirty-four districts where the black voting age population is greater than 20% have a percentage of Democratic voters greater than 50% overall. *Id.*

minority voters to elect candidates in majority-minority districts.[53] The majority closed its opinion by stating that the purpose of the Voting Rights Act is to prevent discrimination in the exercise of the voting franchise and to foster a transformation to a society that is no longer fixated on race.[54] The Supreme Court remanded the case to the district court to reweigh the record in light of their explanation of retrogression.[55]

Concurring with the majority, Justice Kennedy agreed that race was a predominant factor in the creation of Georgia's State Senate district plan.[56] However, he saw a potential inconsistency between Section 2 and Section 5 of the Voting Rights Act resulting in conduct that might violate the Equal Protection Clause of the 14th Amendment.[57] He stated that the basis of this argument is that the Department of Justice is permitted or directed to ratify a course of unconstitutional conduct in order to comply with the statute.[58]

Justice Thomas filed a very brief concurring opinion, reasserting his adherence to the views expressed in his concurring opinion in *Holder v. Hall*,[59] but joining the Court's opinion because it is consistent with prior Section 5 precedents.[60]

Writing for the dissent, Justice Souter agreed that reducing the number of majority-minority districts within a state would not necessarily amount to retrogression under Section 5 of the Voting Rights Act of 1965.[61] However, he explained that before a state is

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53. *Id.* at 2516.

54. *Id.* at 2517. The Court quotes the testimony of Congressman Lewis, who stated: "I think that's what the [civil rights] struggle was all about, to create what I like to call a truly interracial democracy in the South." *Id.*

55. *Ashcroft*, 123 S. Ct. at 2517.

56. *Id.*

57. *Ashcroft,* 123 S. Ct. at 2517 (Kennedy, J., concurring). Justice Kennedy believes that if the Court's statement of the facts of this case had been written as the preface to an Equal Protection Clause challenge, or under § 2 of the Voting Rights Act of 1965, it would succeed. *Id.*

58. *Id.*

59. 512 U.S. 874, 891 (1994). In a lengthy concurring opinion, Justice Thomas traced the history of the Court's jurisprudence under the Voting Rights Act of 1965, and expressed great displeasure with the way the Court has interpreted the act. *Holder,* 512 U.S. at 891 (Thomas, J., concurring in judgment).

60. *Ashcroft*, 123 S. Ct. at 2517-18 (Thomas, J., concurring).

61. *Ashcroft,* 123 S. Ct. at 2518 (Souter, J., dissenting). Justice Souter stated:

> The prudential objective of § 5 is hardly betrayed if a state can show that a new districting plan shifts from supermajority districts, in which minorities can elect their candidates of choice by their own voting power, to coalition districts, in which minorities are in fact shown to have a similar opportunity when joined by predictably supportive nonminority voters.

Id.

allowed to shift from majority-minority to coalition districts, it bears the burden of proving that nonminority voters will vote reliably along with the minority.[62] Justice Souter stated that if the state's evidence does not convince the factfinder that high racial polarization in voting is unlikely, or that high white crossover voting is likely, a reduction of supermajority districts must be treated as retrogressive.[63] As a result, the dissent held that the district court did not err, and the majority mistakes the significance of the evidence supporting their decision.[64]

Justice Souter criticized the Court's decision that a potentially retrogressive redistricting plan could satisfy the requirements of Section 5 if a sufficient number of influence and coalition districts were created, or if the new plan provided minority groups the chance to elect a particularly powerful candidate.[65] He further disagreed with the notion that a state could carry its burden to show a nonretrogressive degree of minority influence by demonstrating that candidates elected without their support would be willing to take the minority's interest into account.[66] In his view, prior rulings of the Court held that a state must show a lack of retrogression in any change in voting procedure, meaning it must not leave minority voters with less chance to effectively elect preferred candidates than before the change.[67] This, he asserted, is contrary to the Court's view that influence may be adequate to avoid retrogression from majority-minority districts when it reflects a willingness on the part of politicians to consider minority interests when they do not require minority support to be elected.[68] Justice Souter further questioned the majority's view due to the lack of a clear standard in evaluating how this influence should be measured and applied.[69]

Another source of contention with the dissent was the notion that a state may trade minority voters' ability to elect a candidate

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62. *Id.*

63. *Id.* The burden of persuasion always falls to the state to show a lack of retrogressive impact. *Id.*

64. *Id.*

65. *Id.*

66. *Ashcroft,* 123 S. Ct. at 2519 (Souter, J., dissenting) (quoting Thornburg v. Gingles, 478 U.S. 30, 100 (1986) (O'Connor, J., concurring in judgement)).

67. *Ashcroft*, 123 S. Ct. at 2519 (Souter, J., dissenting). "[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer*, 425 U.S. at 141.

68. *Ashcroft*, 123 S. Ct. at 2519 (Souter, J., dissenting).

69. *Id.*

of their choice for the ability to influence the selection of a position of legislative power.[70] In the dissent's view, this may result in the state valuing minority votes in a district in which a potential committee chairman might be elected differently from a district with ordinary candidates.[71] Justice Souter found it impossible to believe that Congress intended Section 5 preclearance to turn on such distinctions, and theorized on the possible outcome of employing such analysis.[72]

According to the dissent, the district court never reached the issue of what type of influence districts would be required to offset a decrease in majority-minority districts, because it found the state had not shown the possibility of actual coalitions that would allow such a change without retrogressive effect.[73] As a result, he believed that the Supreme Court should not be making a decision on this issue under the clear error standard that it is to employ, and should not disturb the lower court's ruling because they would have decided it differently.[74]

Reviewing the district court's analysis of the facts, Justice Souter stated that the majority acknowledged that the simple fact of a decrease in black voting age population in some districts is not enough to prove that a redistricting plan is retrogressive.[75] He contended that the Voting Rights Act permits states to move minorities out of districts where they formerly constituted a majority on the condition that racial divisions have healed to the point where reductions in numbers will not lead to result in the weakening of electoral power.[76] The dissent noted that the district court had observed if racial elements consistently vote in separate blocs, then a decrease in the black voter age population will impact the ability of minorities to elect the candidate of their choice.[77] On the facts presented, Justice Souter stated that the district court determined the United States presented evidence that racial polarization existed in the contested districts, while Georgia failed to present anything relevant on the issue in dispute.[78] In his opinion,

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70. *Id.*
71. *Id.* at 2520.
72. *Id.*
73. *Ashcroft*, 123 S. Ct. at 2520-21 (Souter, J., dissenting).
74. *Id.* at 2521.
75. *Id.*
76. *Id.* (quoting *Georgia*, 195 F. Supp. 2d at 78).
77. *Ashcroft*, 123 S. Ct. at 2521-22 (Souter, J., dissenting).
78. *Id.* at 2522. The district court stated that Georgia's expert:

the majority ignored this determination by the lower court because it was not reviewing the decision for clear error, but rather it engaged in a review of the district court *de novo*.[79]

In conducting this *de novo* review, Justice Souter stated that the majority ignored the fact that evidence presented on white crossover voting does not reflect the changes made to districts under the proposed plan.[80] In his view, another fault in the majority's review of the record dealt with the reason the district court only focused on the selected Senate districts.[81] The dissent further criticized the majority for its reliance on the testimony of state politicians, and Georgia's reliance on the nearly unanimous support for the plan by its minority legislators, discounting the district court's conclusion that this evidence was inadequate to carry the state's burden.[82] The majority's treatment of statistics related to the racial composition of the districts is another area of dispute with the dissent, which claims that the percentages in isolation without contextual information did not indicate whether the state carried its burden.[83]

Justice Souter closed his dissent by criticizing the majority's reference to the 1990 census and redistricting plan as being irrelevant to the current efforts.[84] In his view, a proper retrogression analysis must be based on the current census information, and cannot be based on a comparison as to whether the new plan

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made no attempt to address the central issue before the Court: whether the state's proposal is retrogressive . . . The paucity of information in [the expert's] report leaves us unable to use his analysis to assess the expected change in African American voting strength statewide that will be brought by the proposed Senate plan.

Id. (quoting *Georgia*, 195 F. Supp. 2d at 81).

79. *Ashcroft*, 123 S. Ct. at 2522 (Souter, J., dissenting).

80. *Id.* at 2523 (Souter, J., dissenting). Justice Souter pointed out that Epstein's report was not to look at racial polarization, but rather to show whether or not blacks and whites vote for different candidates. *Id.* (Souter, J., dissenting).

81. *Id.* (Souter, J., dissenting). Justice Souter stated that Georgia was the party who asked that the analysis be limited to the disputed districts, and the district court refused. *Id.* (Souter, J., dissenting). He contended that the Court did analyze the state as a whole, and discussed the dispute between the Attorney General's and the state's determinations of the number of majority-minority districts that would exist under the new plan. *Id.* (Souter, J., dissenting).

82. *Id.* at 2524 (Souter, J., dissenting). The district court stated: "[T]he lack of positive racial polarization data was the gap at the center of the state's case [and] the evidence presented by [the] estimable [legislators] does not come close to filling that void." *Id.* (quoting *Georgia*, 195 F. Supp. 2d at 100) (Souter, J., dissenting).

83. *Ashcroft*, 123 S. Ct. at 2524-25 (Souter, J., dissenting). Justice Souter compared the statistics given by the majority and the changes made in the districts to show that this evidence can be interpreted in various ways, and that they do not necessarily provide meaningful information. *Id.* (Souter, J., dissenting).

84. *Id.* at 2525 (Souter, J., dissenting).

is retrogressive in comparison to the previous one.[85] The statistics related to Georgia's Democrats were equally of doubtful relevance in the dissent's opinion.[86] In the end, Justice Souter stated the burden to prove that no retrogression has occurred under Section 5 can only be addressed by presenting "evidence of how particular populations of voters will probably act in the circumstances in which they live."[87] He stated that Georgia has the burden of convincing on that evidence, and the district court determined that it had not.[88]

The Fifteenth Amendment to the United States Constitution states: "The right of citizens of the United States to vote shall not be denied or abridged by the Untied States or by any state on account of race, color, or previous condition of servitude."[89] In order to protect this right, Congress was given the power to enforce it through appropriate legislation.[90] Shortly after this amendment was ratified, Congress passed the Enforcement Act of 1870, which made it a crime for public officers and private persons to obstruct the exercise of the right to vote.[91] The following year the statute was amended, providing for detailed federal supervision of the electoral process.[92] However, due to lack of enforcement, most of the Act's provisions were repealed in 1894.[93] Beginning in 1890, the States of Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia began to enact tests specifically for the purpose of preventing blacks from voting.[94] Typically, voting tests took the form of literacy requirements or required completion of a registration form, while other tests permit-

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85. *Id.* (Souter, J., dissenting).

> The Court's assumption that a proper § 5 analysis may proceed on the basis of obsolete data from a superseded census is thus as puzzling as it is unprecedented. It is also an invitation to perverse results, for if a state could carry its burden under § 5 merely by showing no retrogression from the state of affairs 13 years ago, it could demand preclearance for a plan flatly diminishing minority voting strength under § 5.

Id. (Souter, J., dissenting).

86. *Id.* (Souter, J., dissenting). Justice Souter analyzed the statistics related to the percentages of Democratic voters by district and statewide, and determined that these numbers do not provide any meaningful data as to how people will actually vote. *Id.* (Souter, J., dissenting).

87. *Id.* at 2526 (Souter, J., dissenting).

88. *Ashcroft*, 123 S. Ct. at 2526 (Souter, J., dissenting).

89. U.S CONST. amend. XV, § 1.

90. U.S CONST. amend. XV, § 2.

91. South Carolina v. Katzenbach, 383 U.S. 301, 310 (1966).

92. *Katzenbach*, 383 U.S. at 310.

93. *Id.*

94. *Id.*

ted whites to vote.[95] A series of Supreme Court decisions invalidated these tests one by one, finding that each test was administered differently depending on the race of the prospective voter.[96]

In the 1950's, Congress began to try to deal with voting discrimination by facilitating case-by-case litigation.[97] The Civil Rights Acts of 1957 and 1960 attempted to end racial discrimination in voting in the above-named states.[98] Title I of the Civil Rights Act of 1964 expedited the hearing of voting rights cases before three-judge courts and outlawed discriminatory tactics that had been used to keep blacks from voting in federal elections.[99] These laws, however, had little impact on the problem of voter discrimination.[100] Litigation to correct racial discrimination in voting had proved ineffective due to the amount of preparation required, and the opportunities for voting officials to delay the proceedings.[101] Even when litigation on these issues succeeded, some of the states would change to other discriminatory methods not covered by the federal decrees, or in the alternative, local officials would defy or evade the court orders.[102] Other tactics included the closing of registration offices to freeze the voting rolls.[103]

The Voting Rights Act of 1965 was created out of Congress' firm intention to rid the nation of racial discrimination in voting.[104] Section 5 of the act instituted a suspension of new voting regulations, as well as a requirement that any subsequent regulations be approved by the Attorney General or, in the alternative, by a three-judge district court panel, which could be appealed directly

95. *Id.* at 310-11. More than two-thirds of the adult blacks in the named states were illiterate in 1890, in contrast to less that one-quarter of the adult whites. *Id.* Alternate tests were created to insure that illiterate whites would be permitted to vote, including grandfather clauses, property qualifications, "good character tests," and the requirement that registrants "understand" or "interpret" certain matter. *Id.* at 311.

96. *Id.* at 311-12.

97. *Katzenbach*, 383 U.S. at 313.

98. *Id.* The Civil Rights Act of 1957 authorized injunctive relief against public and private interference with the right to vote on the basis of race, while the Civil Rights Act of 1960 allowed the joinder of states as defendants and gave the federal government more control over voting in areas of systematic discrimination. *Id.*

99. *Id.*

100. *Id.* According to estimates by the Attorney General, during hearings on the Voting Rights Act of 1965, registration of voting age blacks between 1958 and 1964 in Alabama only rose from 14.2% to 19.4%. *Id.* The increases in other southern states during this period were even smaller. *Id.* Registration of voting age whites in these states was approximately 50% higher by comparison. *Id.*

101. *Id.* at 314.

102. *Katzenbach*, 383 U.S. at 314.

103. *Id.*

104. *Id.* at 315.

to the U.S. Supreme Court.[105] This procedure was in response to the common state practice of passing new discriminatory voting laws as soon as the Court invalidated the prior ones.[106] The measures employed by this act were motivated by what Congress viewed as "an insidious and pervasive evil which had been perpetuated through unremitting and ingenious defiance of the Constitution."[107] Furthermore, Congress determined that sterner and more elaborate measures would be necessary to satisfy the dictates of the Fifteenth Amendment.[108] In the latter half of 1965, the aforementioned states were brought under the coverage of the act and required to submit to its demands.[109]

In January 1966, South Carolina filed a bill in equity for determination of validity of selected provisions of the Voting Rights Act of 1965.[110] It contended that the Act violated the United States Constitution, and asked for an injunction against enforcement of the selected provisions by the Attorney General.[111] The Court rec-

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105. 42 U.S.C. § 1973(c) (2000). This section allows for any qualification, prerequisite, standard, practice, or procedure to become effective if the Attorney General has not objected to it within sixty days of its submission, or indicates that no objection will be made. *Id.* This provision does not bar a subsequent action to enjoin enforcement of the plan and the Attorney General may reserve the right to re-examine the submission despite affirmatively indicating that no objection will be made during the sixty-day period following receipt. *Id.*

106. *Beer*, 425 U.S. at 140 (quoting H.R. REP. NO.94-196, at 57-58 (1965)). This section explains Congress' intent in creating § 5 as follows:

> Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing discriminatory voting laws as soon as the old ones had been struck down. That practice has been possible because each new law remained in effect until the Justice Department or private plaintiffs were able to sustain the burden of proving that the new law, too, was discriminatory . . . . Congress therefore decided, as the Supreme Court held it could, "to shift the advantage of time and inertia from the perpetrators of the evil to its victim." By freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory.

Id. (citations omitted).

107. *Katzenbach*, 383 U.S. at 310. *See also* H.R. REP. NO. 439, at 8-16 (1965) and S. REP. NO. 162, pt. 3, at 3-16 (1965).

108. *Katzenbach*, 383 U.S. at 310.

109. *Id.* at 318. A state, or any separate political subdivision falls under the remedial sections of the act if two findings have been made: (1) the Attorney General has determined that on November 1, 1964, it maintained a "test or device," and (2) the Director of the Census has determined that less than 50% of its voting age residents were registered on November 1, 1964, or voted in the 1964 presidential election. *Id.* at 317. On August 7, 1965, South Carolina, Alabama, Alaska, Georgia, Louisiana, Mississippi, Virginia, 26 counties in North Carolina, and one county in Arizona were brought under the Act. *Id.* at 318.

110. *Id.*

111. *Id.* at 307. The Court noted that original jurisdiction for this action was founded on the presence of a controversy between a state and a citizen of another state. *Id.* (citing U.S. CONST. art. III, § 2).

ognized that the questions presented were of "urgent concern" for the entire country and allowed all of the states to participate as friends of the Court.[112] The primary challenge asserted by South Carolina was that the provisions of the Act exceeded the powers of Congress, thereby encroaching on an area reserved to the states by the Constitution.[113] The challenges particular to Section 5 alleged that the review of the voting rules infringed upon Article III of the Constitution by directing the district court to issue advisory opinions, and that the act abridged due process by limiting litigation to a distant forum.[114]

In making its ruling in *South Carolina v. Katzenbach*, the Court explained that the Fifteenth Amendment has always been treated as self executing and as invalidating state voting qualifications or procedures that are discriminatory on their face or in practice.[115] In addition, the Court held the provision in Section 2 of the Fifteenth Amendment gives Congress the power to enact legislation appropriate to enforce it.[116] The Court used this provision to support its rejection of South Carolina's argument, that Congress may not take affirmative action to create remedies to Fifteenth Amendment violations and may only address general violations of that amendment.[117] Addressing the provisions of Section 5 of the Act, Chief Justice Warren recognized this was an uncommon exercise of Congressional power, but one made necessary by its knowledge that the covered states might attempt to evade the remedies it created for voting discrimination.[118] He dismissed the notion that this section required the Court to issue an advisory opinion.[119] Because the Act suspended the operation of voting regulations enacted after November 1, 1964, the Chief Justice determined that it created an immediate controversy with the federal government if the state wished to make any change.[120]

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112. *Id.* at 307. The states supporting South Carolina were Alabama, Georgia, Louisiana, and Virginia. *Id.* The states supporting the Attorney General were California, Illinois, and Massachusetts, joined by Hawaii, Indiana, Iowa, Kansas, Maine, Maryland, Michigan, Montana, New Hampshire, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Vermont, West Virginia, and Wisconsin. *Id.* at 307-08.

113. *Katzenbach*, 383 U.S. at 323.

114. *Id.*

115. *Id.* at 325.

116. *Id.* at 326.

117. *Id.* at 327.

118. *Katzenbach*, 383 U.S. at 335.

119. *Id.*

120. *Id.*

Having determined that the act was constitutional, in *Allen v. State Board of Elections*,[121] the Court took the next step to determine whether various state enactments were subject to the requirements of the Act.[122] In *Allen*, the Court dealt with four cases involving the application of the Voting Rights Act of 1965.[123] In each case, the states enacted new laws or issued new regulations and sought to determine if these fell under the auspices of Section 5.[124] The district court in each instance subsequently dismissed the complaint.[125] Before the Court was able to address the substantive issues presented by these cases, it had to determine whether a private individual had standing to bring an action under the Act, or whether such standing was reserved solely for the Attorney General.[126] Writing for the majority, Chief Justice Warren declared that it was "consistent with the broad purpose of the Act to allow the individual citizen standing to insure that his city or county government complies with the Section 5 approval requirements."[127]

Turning to the substantive issues of the case, the majority addressed the question of what type of actions taken by state or local governments were covered by Section 5.[128] Among the issues in

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121. 393 U.S. 544 (1969).

122. *Allen*, 393 U.S. at 548.

123. *Id.* at 547-48. This case represented the consolidation of three cases from Mississippi, and one from Virginia, all dealing with related issues. *Id.*

124. *Id.* at 550-53.

125. *Id.*

126. *Id.* at 554-55. Chief Justice Warren stated:

> The Voting Rights Act does not explicitly grant or deny private parties authorization to seek a declaratory judgment that a state has failed to comply with the provisions of the Act. However, § 5 does provide that "no person shall be denied the right to vote for failure to comply with (a new state enactment covered by, but not approved under § 5)." Analysis of this language in light of the major purpose of the Act indicates that appellants may seek a declaratory judgment that a new state enactment is governed by § 5. Further, after proving that the state has failed to submit the covered enactment for § 5 approval, the private party has standing to obtain an injunction against further enforcement, pending the state's submission of the legislation pursuant to § 5.

Id. (citations omitted).

127. *Allen*, 393 U.S. at 557. Other jurisdictional matters dealt with by the Court included whether or not a private plaintiff must bring suit on § 5 in the District Court for the District of Columbia, and whether Congress intended disputes arising under § 5 must be heard by a three-judge panel. *Id.* at 557-63. The Court determined requiring a private litigant to bring suit only in the District of Columbia might impose such a burden as to preclude him from bringing suit. *Id.* at 560. In regard to the use of three-judge panels to hear these suits, the Court held because of the potential clash between state and federal power, Congress intended disputes involving the coverage of § 5 be determined by a district court of three judges. *Id.*

128. *Id.* at 563.

dispute was whether a change from district to at-large voting would fall under Section 5, as it would cause a conflict in the administration of reapportionment legislation.[129] In the Mississippi cases, the state contended that under a broad reading of Section 5, enforcement of a reapportionment plan could be enjoined for failure to meet the approval requirements, even though a federal court had approved the plan.[130] Chief Justice Warren dismissed the narrow construction that the states would have given Section 5, explaining that the Voting Rights Act was aimed at both the subtle and obvious regulations which had the effect of denying citizens the right to vote on the basis of race.[131] After an extensive review of the Act's legislative history, the Court determined that it was within the intent of Congress to cover all of the enactments at issue in the cases under the umbrella of Section 5.[132] The Court also held that it was not sufficient as a submission when the Attorney General did not object to the enforcement of the enactments after becoming aware of their existence.[133] The Court held that it was now necessary for the states to submit any "legislation or regulation in question directly to the Attorney General with a request for his consideration pursuant to the Act."[134]

With the decision in *Allen* regarding what type of enactments came under the control of Section 5, in *Georgia v. United States*,[135] the Court faced the issue of whether the reapportionment of voting districts was also covered.[136] Following the 1970 census, Georgia submitted a plan to the Attorney General to reapportion its legislative districts.[137] After receiving the plan, a representative of the Department of Justice requested further information to be used in its evaluation.[138] Once the plan was reviewed, the Justice Department rejected it on the basis that it was unable to conclude

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129. *Id.* at 564.
130. *Id.* at 565.
131. *Id.* at 565.
132. *Allen*, 393 U.S. at 570-71.
133. *Id.* at 571. In rejecting this argument, the Court stated:
> While the Attorney General has not required any formal procedure, we do not think the Act contemplates that a 'submission' occurs when the Attorney General merely becomes aware of the legislation, no matter in what manner. Nor do we think the service of the briefs on the Attorney General constituted a 'submission.'

Id.
134. *Id.*
135. 411 U.S. 526 (1973).
136. *Georgia*, 411 U.S. at 526.
137. *Id.* at 528.
138. *Id.* at 529.

that the plan did not have a discriminatory racial effect on voting.[139] The state enacted another plan in 1972, but the Attorney General failed to grant preclearance on the basis that it did not sufficiently fix the defects found in the previous plan.[140] The Attorney General initiated a lawsuit when the Georgia Legislature decided it would make no further effort to present a new plan, and responded to the suit by claiming Section 5 did not reach the reapportionment of voting districts.[141]

Speaking for the majority, Justice Stewart stated that the prior decisions of the Court compelled the conclusion that Section 5 governed changes to voting districts like those being made under Georgia's 1972 House reapportionment plan.[142] The Court based its ruling on the determination of the reach of Section 5 established in *Allen*, and by the fact that subsequent changes made by Congress to the Voting Rights Act did not disturb the decision in that ruling.[143] Also considered by the Court was the practice of the covered states, including Georgia, which had been submitting their redistricting plans to the Attorney General for approval since the *Allen* decision.[144] Because the potential for diluting the value of the minority vote existed through the process of reapportionment, the Court determined the district court was correct in deciding that the changes made by Georgia in its House of Representatives plan fell under the control of Section 5.[145] In addition, the Court approved a series of regulations promulgated by the Attorney General's office to govern the procedure for submission of plans for approval, further reinforcing the notion that preclearance of redistricting plans was required under Section 5.[146]

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139. *Id.* at 530. The Attorney General objected to the plan because of its use of "multimember districts, numbered posts, majority runoff elections, and the extensive departure from the state's prior policy of adhering to county lines." *Id.*

140. *Id.* at 530.

141. *Georgia*, 411 U.S. at 531.

142. *Id.*

143. *Id.* at 533. The Court noted that during the deliberations to extend the Voting Rights Act the *Allen* decision was repeatedly discussed, yet § 5 was not modified in any substantive way. *Id.*

144. *Id.* at 533-34.

145. *Id.* at 534-35.

146. *Georgia*, 411 U.S. at 536-41. The state argued that the Attorney General had granted himself more time than the statute provided to evaluate plans through the use of regulations. *Id.* While the statute is silent on the authority of the Attorney General to promulgate regulations, it is also silent on the procedures he may employ in deciding whether or not to object to state submissions. *Id.* at 536. The Court reasoned that if these regulations are reasonable and do not conflict with the Act itself, then the Attorney General

Given the Court's decision in *Georgia v. United States* that Section 5 applied to legislative redistricting, in *Beer v. United States*,[147] the Court had to determine how the Georgia holding was to be applied in practice.[148] In *Beer*, the City of New Orleans brought suit under Section 5 seeking a judgment declaring that a reapportionment of its council districts did not have the purpose or effect of denying or abridging the right to vote on the basis of color.[149] After receipt of the 1970 census, the city council adopted a redistricting plan that preserved the basic north-to-south pattern of the 1960 redistricting plan, which predated the adoption of Section 5.[150] Under this plan, blacks constituted a majority of the population in two districts, but did not make up a majority of the registered voters in any district.[151] This plan, called Plan I by the Court, was rejected by the Attorney General because it had the effect of diluting black voting strength by combining black voters with a greater number of white voters in all of the districts.[152] A second plan, called Plan II, was created following the general north-to-south pattern of the prior plan, but included two districts with a majority-minority population and one with a majority black voter population.[153] The Attorney General objected to this plan on the same basis as Plan I, noting that the predominately black neighborhoods ran in an east-to-west progression, and the north-to-south districts would have the effect of diluting the maximum potential impact of the black vote.[154] The district court agreed with the Attorney General, concluding that Plan II would have the effect of abridging the right to vote on account of race or color.[155]

In reversing the district court, Justice Stewart declared that the purpose of Section 5 had always been to insure that no changes would be made that would lead to "a retrogression in the position

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had the authority as head of an Executive department to create regulations for his department. *Id.*

147. 425 U.S. 130 (1976).

148. *Beer*, 425 U.S. at 130.

149. *Id.* at 133.

150. *Id.* at 135.

151. *Id.* at 134-35. The population of New Orleans was approximately 600,000 people, 55% being white and 45% black. *Id.* Approximately 65% of the registered voters were white, while only 35% were black. *Id.* The municipal charter provided that the city council would consist of seven members, one elected from each of five districts, with two elected at large. *Id.* The largest percentage of black voters in a single district under Plan I was 45.2%. *Id.* at 135.

152. *Id.* at 135.

153. *Beer*, 425 U.S. at 136.

154. *Id.* at 136.

155. *Id.*

of racial minorities with respect to their effective exercise of the electoral franchise."[156] The majority concluded that retrogression could not be found under Plan II because the arrangement of the districts created the potential for the election of a minority candidate in two of the five districts, and as a result, the district court erred in failing to approve the plan.[157] This view was opposed by Justice Marshall, who believed the purpose of Section 5 was to preclude new districting plans that perpetuated discrimination, which was not served by an inquiry into whether a proposed plan was retrogressive.[158] In his view, a covered jurisdiction fails to meet its burden under Section 5 if the proposed redistricting plan underrepresents minority group members.[159]

The necessity of retrogression to invalidate a voting plan was furthered by the Court's holding in *City of Lockhart v. United States*.[160] The City of Lockhart, Texas, made the switch from a general law city to a home rule charter, allowing the city to exercise any power not expressly forbidden by the state.[161] As part of this change, the city switched from a mayor and commissioner system of government to a mayor and city council system, but retained its previous numbered post election procedure.[162] In 1977, four Mexican-Americans challenged this change on the basis that Lockhart had never obtained approval under Section 5 and sought an injunction to prevent the City from using its new election procedures.[163] The District Court for the Western District of Texas granted injunctive relief, blocking future elections until Lockhart sought preclearance from the Attorney General who in turn objected to the voting procedure, including the numbered post system.[164] The city then filed suit in the District Court of the District of Columbia for a declaratory judgment, which concluded that the numbered posts and staggered terms each had a discriminatory impact forbidden by Section 5.[165]

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156. *Id.* at 141.
157. *Id.* at 142.
158. *Beer*, 425 U.S. at 151-52 (Marshall, J., dissenting).
159. *Id.* at 157-58 (Marshall, J., dissenting).
160. 460 U.S. 125 (1983).
161. *Lockhart*, 460 U.S. at 127.
162. *Id.* The numbered post election system designates the seats by number, and each candidate specifies what post they are running for. *Id.* This results in each seat being an individual race as if it was a separate office. *Id.*
163. *Id.* at 127-28. At the time of the suit, almost 47% of Lockhart's population, but fewer than 30% of the city's registered voters, were of Mexican-American descent. *Id.*
164. *Id.* at 129.
165. *Lockhart*, 460 U.S. at 130.

Writing for the majority, Justice Powell suggested that the proper comparison for determining retrogressive effect was to evaluate the new plan in light of the old plan, and not as the district court had done by excluding the practice of numbered posts.[166] The Court concluded that the numbered post system had been in effect since 1917 and, while it may have the effect of discriminating against minorities in a city where racial bloc voting predominates, this impact was no greater under the new system than the old.[167] The Court determined that while the use of staggered terms may also have a discriminatory effect, this did not cause any retrogression in the strength of the minority vote, and minorities had actually gained strength since the adoption of the new plan.[168] Once again Justice Marshall voiced his dissent that the use of a retrogression analysis did not satisfy the dictates of Section 5, stating that the purpose of the section includes forbidding preclearance to plans that perpetuate discrimination.[169]

Section 5 has also been held to prevent the construction of irregularly shaped voting districts, solely created for the purpose of insuring minority victory in election.[170] After the 1990 census, North Carolina was granted a 12th seat in the United States House of Representatives and the General Assembly enacted a reapportionment plan that included one majority-minority congressional district.[171] The Attorney General refused to grant preclearance to the plan because it failed to take advantage of potential gains in minority influence that would have resulted in the creation of a second majority-minority district.[172] A second plan was created, this time with a second majority-minority district, both of which were unusually shaped to maximize their minority content.[173] This plan was approved by the Attorney General, but was objected to by citizens of the state who brought suit in federal

166. *Id.* at 132-33.
167. *Id.* at 134-35.
168. *Id.* at 135-136. The evidence discussed by the Court showed that since 1973 the Mexican-American voter turn out had increased from the levels of the prior system, and in 1978 a Mexican-American candidate was elected in Lockhart for the first time in the City's history. *Id.*
169. *Id.* at 136-37 (Marshall, J., dissenting).
170. Shaw v. Reno, 509 U.S. 630 (1993).
171. *Shaw*, 509 U.S. at 633.
172. *Id.* at 634-35.
173. *Id.* at 635-36.

district court, alleging an unconstitutional racial gerrymander and a violation of the concept of "one person, one vote."[174]

Justice O'Connor, writing for the majority, stated that the North Carolina General Assembly adopted a reapportionment plan so irrational on its face that it could only be understood as an effort to segregate voters on the basis of race, and therefore was a violation of the Equal Protection Clause of the Fourteenth Amendment.[175] In making this ruling, the Court explained that a reapportionment plan that included in one district those of the same race, but who are otherwise widely separated by geographic and political boundaries, bears an "uncomfortable resemblance to political apartheid."[176] In her view, a redistricting plan such as this would have the effect of causing elected officials to believe their primary obligation is to represent the majority group, rather than all the individuals who live in the district.[177] As a result, the Court allowed the plaintiff to challenge the reapportionment plan on Equal Protection grounds because the legislation separated voters into districts based on race without any other rational explanation.[178]

The rationale employed in *Shaw* was once again applied in *Miller v. Johnson*,[179] a case involving the reapportionment of Georgia's United States Congressional Districts.[180] In *Miller*, Georgia was granted an additional Congressional seat after the 1990 census, and created a plan that featured an increase from one majority-minority district to two, and a third with a black voter age population of 35%.[181] The Attorney General's office refused preclearance on the ground that the plan only created two majority-minority districts and did not recognize certain minority popula-

174. *Id.* *See* Reynolds v. Sims, 377 U.S. 533, 558 (1964). A previous suit brought on the theory of an unconstitutional political gerrymander by the same parties was dismissed. *Id.* *See also* Pope v. Blue, 809 F. Supp. 392 (W.D.N.C. 1992). The appellants in *Shaw* contended that the General Assembly created two Congressional Districts in which a majority of black voters was concentrated without regard to other factors for the purpose of insuring the election of two black representatives to Congress. *Shaw*, 509 U.S. at 637. The three-judge district court granted a motion to dismiss and the Supreme Court heard the appeal. *Id.* at 637-38.

175. *Shaw*, 509 U.S. at 658.

176. *Id.* at 647. The Court reasoned that this segregation reinforces the perception that members of the same racial group, regardless of their differences, will prefer the same candidates at the polls. *Id.*

177. *Id.* at 648.

178. *Id.* at 649.

179. 515 U.S. 900 (1995).

180. *Miller*, 515 U.S. at 900.

181. *Id.* at 906.

tions by putting them in a majority black district.[182] A second plan was submitted that increased the black population in several districts, but was again rejected by the Justice Department because it did not reflect the possibility of a third majority district found in another proposed plan.[183] The Justice Department concluded that by refusing to enact this plan into law, Georgia had failed to adequately explain its failure to create a third majority-minority district.[184] The General Assembly created yet a third plan, which created an unusually shaped third majority-minority district, the Eleventh District, and was finally granted preclearance by the Attorney General.[185]

Delivering the opinion of the Court, Justice Kennedy reaffirmed the holding in *Shaw* and upheld the ruling of the district court finding that race was the predominate factor in drawing the Eleventh District.[186] The majority also agreed with that Court's finding that the Justice Department had adopted a "black-maximization" policy under Section 5, and that it was clear from the objection letters sent to the state that its redistricting plan would not be approved unless a third majority-minority district was created.[187] Justice Kennedy declared that the creation of the Eleventh District was not required under the Act because there was no reasonable basis to believe that Georgia's earlier enacted plans violated Section 5.[188] By using Section 5 to require states to create majority-minority districts wherever possible, the Court held that the Justice Department exceeded its authority under the statute, and

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182. *Id.* at 907.

183. *Id.* One of the alternate plans the Attorney General relied on was called the "max-black" plan, which was drafted by the American Civil Liberties Union. *Id.* This plan resulted in an unusually shaped district connecting areas of dense population in a corridor running from Macon to Savannah. *Id.*

184. *Id.* at 907.

185. *Miller*, 515 U.S. at 908. During the 1992 elections, black candidates were elected in all three majority-minority districts. *Id.* at 909. In 1994, five white voters from the unusually shaped 11th district filed suit in the United States District Court for the Southern District of Georgia alleging that their district was an unconstitutional racial gerrymander. *Id.* A majority of the district court panel agreed with the plaintiffs, relying on the Supreme Court's holding in *Shaw* by applying a strict scrutiny standard. *Id.* at 909-10.

186. *Id.* at 917. The Court recognized that the trial court concluded the Attorney General had spent months demanding purely race-based revisions to the redistricting plans, and Georgia spent months trying to comply. *Id.* at 918.

187. *Id.* at 921.

188. *Id.* at 923. Georgia's first two attempts resulted in an increase from one majority-minority district out of ten, to two districts out of eleven, making these plans ameliorative, and not retrogressive in violation of § 5. *Id.* "Ameliorative" is a term used by the Court to describe plans increasing the number of majority-minority districts in a state. *Id.*

brought the Act into conflict with the Equal Protection Clause of the Fourteenth Amendment through race based districting.[189]

In *Reno v. Bossier Parish School Board* (*Bossier Parish I*),[190] the Supreme Court dealt with the issue of whether preclearance must by denied under Section 5 when a covered jurisdiction's redistricting plan violates Section 2 of the Voting Rights Act of 1965.[191] After the 1990 census, the School Board for Bossier Parish, Louisiana, attempted to redraw the borders of its voting districts by adopting the same borders drawn by the Bossier Parish Police Jury, the governing body for the parish.[192] This plan had previously received preclearance by the Attorney General, leading the School Board to believe that their plan would be precleared as well.[193] However, preclearance was refused because the School Board failed to adopt a plan proposed by the local chapter of the National Association for the Advancement of Colored People (NAACP), which would have created two majority-minority districts, but would also require splitting 46 voting precincts.[194] The School Board filed suit in the District Court for the District of Columbia, which rejected the contention that an alleged failure to satisfy Section 2 constituted an independent reason to deny preclearance under Section 5.[195] The district court ruled in favor of the School Board, deciding that a court was not required to consider evidence of a violation of Section 2 as evidence of discriminatory purpose under Section 5.[196]

Delivering the majority opinion, Justice O'Connor rejected the notion that preclearance must be denied when a covered jurisdiction's redistricting plan violates Section 2, stating that this view would "call in to question more than 20 years of precedent interpreting Section 5."[197] The Court held that evidence of a dilutive

189. *Id.* at 925-27.

190. 520 U.S. 471 (1997).

191. *Bossier Parish I*, 520 U.S. at 471. Section 2 bars all states and their subdivisions from taking measures that result in the denial or abridgement of the right to vote on the basis of race or color. *Id.* at 479.

192. *Id.* at 474-75.

193. *Id.* at 475.

194. *Id.* The Attorney General's objection letter stated that the plan violated § 2 of the Act by un-necessarily limiting the opportunity for minority voters to elect candidates of their choosing. *Id.* The Justice Department relied on 28 C.F.R. § 51.55(b)(2) (1996), which allows the Attorney General to withhold preclearance when necessary to prevent a clear violation of § 2. *Id.*

195. *Id.* at 476.

196. *Bossier Parish I*, 520 U.S. at 476.

197. *Id.* at 480.

impact might be relevant when analyzing a plan for Section 5 purposes, however, that does not mean such evidence should be considered dispositive.[198] Unable to determine whether the district court considered evidence of the dilutive impact of the School Board's redistricting plan, the Court vacated that aspect of the lower court's opinion and remanded the case for a determination of whether the plan was motivated by a discriminatory purpose.[199]

On remand, the district court held that the record did not support a conclusion that the School Board's plan contained a non-retrogressive yet discriminatory purpose.[200] Hearing the appeal (*Bossier Parish II*), the Supreme Court was faced with determining whether the Section 5 purpose inquiry extends beyond the search for retrogressive intent, the question they had left open on remand.[201] Re-affirming the Court's decision in *Bossier Parish I*, the majority refused to blur the distinction between Section 2 and Section 5 by shifting the focus of Section 5 from non-retrogression to vote dilution and mandating a benchmark of a hypothetical undiluted plan.[202] The opinion of the Court, delivered by Justice Scalia, declared that Section 5 "prevents nothing more than backsliding, and preclearance under Section 5 affirms nothing but the absence of backsliding."[203] Supporting the Court's retrogression standard announced in *Beer,* Justice Scalia explained that Section 5 preclearance proceedings specifically deal with changes in the status quo, which is the baseline used to determine if the proposed changes will lead to a retrogression.[204] In contrast, he stated that an analysis under Section 2 involves examining whether the status quo abridges the right to vote, which would require comparison to a hypothetical alternative.[205]

198. *Id.* at 487. The Court observed that a jurisdiction's single decision to choose a redistricting plan that results in a dilutive impact does not, without more, suffice to establish that the jurisdiction acted with a discriminatory purpose. *Id.* (citing Shaw v. Hunt, 517 U.S. 899, 914 n.6 (1996)).

199. *Id.* at 490. Justice O'Connor stated that the district court should apply the standard set forth in *Arlington Heights*, to determine whether an "individious discriminatory purpose" was a motivating factor in the government body's decision making. *Id.* at 488 (*See* Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977)).

200. Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 326 (2000). *See* Bossier Parish Sch. Bd. v. Reno, 7 F. Supp. 2d 29, 31 (D.D.C. 1998).

201. *Bossier II*, 528 U.S. at 326.

202. *Id.* at 336.

203. *Id.* at 335.

204. *Id.* at 334.

205. *Id.*

Looking back on the history of the application of Section 5, and its accompanying jurisprudence, one can see the evolution of an Act that was intended to eradicate past injustice, but began to be misused to serve a certain political agenda. There is no question that this Act has had a great impact in the relationship between the states and the federal government, and on the concept of federalism in general. The early cases like *Katzenbach,*[206] *Allen,*[207] and *Georgia v. United States*[208] were attempts by the states to circumvent the Act, or limit its applicability. Once the Court established the application of the law, cases like *Beer*[209] and *City of Lockhart*[210] laid the foundation of how later controversies were to be decided, and the form of analysis that was to be used, giving the states a standard to be evaluated against. In later cases like *Shaw,*[211] *Miller,*[212] and *Bossier Parrish I & II,*[213] we see efforts by the Justice Department to exceed the intended scope of the Act, and use its preclearance power as a tool to force the states to accept its vision for the composition of their representation. In all three instances, the Court has held firm to its standard of *Beer*, that Section 5 dictates nothing more than the prevention of backsliding by the covered states.[214]

In *Georgia v. Ashcroft*, the Court held true to this analysis, recognizing that great strides have been made in the effort to protect the voting rights of formerly disenfranchised minorities. In the nearly four decades that have passed since the enactment of the Voting Rights Act of 1965, the states have moved from trying to find ways to avoid compliance with its requirements, to creating new ways to spread minority influence within their borders. This truly must meet the intent of Congress when they passed this bill into law, and should be recognized by the Justice Department when a redistricting plan is considered for preclearance. While it is true that marginal losses occurred in a few voting districts under the 2000 redistricting plan, the state's intent was not to lessen minority influence in those districts, rather it was to increase the power of black voters state wide. The wide acceptance of this plan

206. *See supra* notes 110-120 and accompanying text.
207. *See supra* notes 121-134 and accompanying text.
208. *See supra* notes 134-146 and accompanying text.
209. *See supra* notes 147-159 and accompanying text.
210. *See supra* notes 160-169 and accompanying text.
211. *See supra* notes 170-178 and accompanying text.
212. *See supra* notes 179-189 and accompanying text.
213. *See supra* notes 190-205 and accompanying text.
214. *Bossier II*, 528 U.S. at 335.

by both black and white representatives demonstrates the growth of the state, and that improvements in race relations have been made. The Court is now giving the states credit for their efforts by insisting that the Justice Department look beyond the percentages, and focus on the bigger picture.

Taking these improvements into consideration, one must wonder if Section 5 has fulfilled its intended purpose, and is no longer necessary. The section's massive intrusion on the concept of federalism has always been justified as a response to the purposeful acts of the states in denying the voting franchise to black voters. The states named as covered jurisdictions gained that distinction through a history of discriminatory state action. However, cases like *Georgia v. Ashcroft* point out the fact that these states have learned from the past, and are now taking affirmative steps to correct their past failures. In addition, the actions of the Justice Department in cases like *Shaw* and *Miller* show that it is possible for the federal government to abuse its power, and force its own agenda on the states who are making legitimate efforts to meet the dictates of the law. Failure to credit the states for their growth in this area can only create greater tension among the political divisions of the nation, potentially fostering resentment among the races as they try to work out an acceptable compromise.

In his famous 1963 speech delivered on the steps of the Lincoln Memorial, Dr. Martin Luther King Jr. declared "I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character."[215] Four decades later, the color of skin is still being used to divide the nation in the exercise of one of our most fundamental rights, that of voting. It is time to begin putting aside the focus on race as the basis of the organization of our political structure. We need to focus on what makes us all the same, not what makes us different. The actions of the State of Georgia in the creation of its 2000 State Senate redistricting plan show a genuine effort in the direction of progress, and the Supreme Court has now recognized this achievement.

Daniel L. Stants

215. DR. MARTIN LUTHER KING, JR., A CALL TO CONSCIENCE: THE LANDMARK SPEECHES OF DR. MARTIN LUTHER KING, JR. 85 (Clayborne Carson & Kris Shepard ed., Intellectual Properties Management, Inc., In Association with Warner Books 2001).